

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3       WILLIAM JOSEPH GIAMBRA,

4                   Plaintiff

5       v.

6       C.R. BARD INCORPORATED and BARD  
7       PERIPHERAL VASCULAR  
8       INCORPORATED,

          Defendants

Case No.: 2:19-cv-01580-APG-BNW

**Order Denying Motion to Dismiss and  
Substituting Plaintiffs**

[ECF No. 50]

9           On February 18, 2020, defendants C.R. Bard Incorporated and Bard Peripheral Vascular  
10   Incorporated filed a suggestion of death as to plaintiff William Joseph Giambra. ECF No. 36.

11   Thereafter, the plaintiff's counsel moved to withdraw. ECF No. 38. On March 13, 2020,  
12   Magistrate Judge Weksler granted the motion to withdraw and gave the plaintiff's son, William  
13   Joseph Giambra, Jr., until May 12, 2020 to find counsel to substitute into the case. ECF No. 45.

14   After no one entered an appearance or moved to substitute, the defendants moved to dismiss.  
15   ECF No. 50. In response, counsel for William Giambra's heirs, William Joseph Giambra, Jr. and  
16   Gina Giambra, entered an appearance. The heirs argue that they missed the deadline due to the  
17   global pandemic that began just as they were required to obtain counsel and substitute.

18           Under Rule 25(a)(1), "[i]f a party dies and the claim is not extinguished, the court may  
19   order substitution of the proper party. A motion for substitution may be made by any party or by  
20   the decedent's successor or representative. If the motion is not made within 90 days after service  
21   of a statement noting the death, the action by or against the decedent must be dismissed."

22           Although the rule states that an action "must" be dismissed, I have discretion to extend  
23   the deadline under Rule 6(b). *Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1094 (9th

1 Cir. 2017). Rule 25's "90 day time period was not intended to act as a bar to otherwise  
2 meritorious actions, and extensions of the period may be liberally granted." *Id.* Under Rule  
3 6(b)(1)(B), I may extend an expired deadline for good cause "if the party failed to act because of  
4 excusable neglect." Rule 6(b), "like all the Federal Rules of Civil Procedure, [is] to be liberally  
5 construed to effectuate the general purpose of seeing that cases are tried on the merits."  
6 *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258-59 (9th Cir. 2010) (quotation omitted).  
7 To determine whether a party's failure to meet a deadline constitutes excusable neglect, I apply  
8 "a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the  
9 length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and  
10 (4) whether the movant acted in good faith." *Id.* at 1261.

11       The defendants do not identify any prejudice other than the passage of time and that they  
12 have to devote resources to a case where it is unclear if the heirs intend to pursue it. The heirs  
13 have now indicated that intent, so there is little to no prejudice to the defendants. The heirs'  
14 counsel made an appearance and responded to the motion to dismiss within two and a half  
15 months after the deadline expired in response to the defendants' motion to dismiss. Although  
16 that is a lengthy period given the additional 60 days Judge Weksler had already given William  
17 Joseph Giambra, Jr., that time period must be considered in context of the global pandemic that  
18 resulted in shutdowns and stay at home orders within days of the hearing before Judge Weksler.  
19 William Joseph Giambra, Jr. expressed his desire to pursue the case at the March 2020 hearing,  
20 and he and Gina Giambra have now appeared through counsel and express the intent to pursue  
21 this action. There is no evidence that the heirs have acted in anything other than good faith.  
22 Given the preference for deciding cases on their merits, the equities weigh in favor of allowing  
23 the heirs to substitute and proceed with this case.

1 I therefore extend the time for the heirs to substitute as plaintiffs and now substitute them  
2 as plaintiffs in this action. As a result, I deny the defendants' motion to dismiss. However, I  
3 caution the heirs that they must act diligently to follow court rules, orders, and deadlines in the  
4 future.

5 I THEREFORE ORDER that William Joseph Giambra, Jr. and Gina Giambra are  
6 substituted as plaintiffs for deceased plaintiff William Joseph Giambra. The clerk of court is  
7 instructed to amend the caption accordingly.

8 I FURTHER ORDER that the defendants' motion to dismiss (**ECF No. 50**) is **DENIED**.

9 DATED this 8th day of March, 2021.

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12 ANDREW P. GORDON  
13 UNITED STATES DISTRICT JUDGE  
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